

PART 33

PROTESTS, DISPUTES, AND APPEALS

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SUBPART 33.1 - PROTESTS

33.103 Protests to the agency

(c) All DLA field activities shall provide a protest procedure as an alternative to filing a protest with the contracting officer. The decision maker for such an alternative "agency level" procedure shall be at least one level above the contracting officer. Legal concurrence is required on all agency level protest decisions.

(91) Each activity shall collect information concerning protests filed each fiscal year under the alternative protest procedure. This information shall include the number of protests filed and their disposition, whether or not there was a stay of procurement/award, and the number of any subsequent protests to the General Accounting Office.

DLAD 33.104 -- Protests to GAO

(a) General Procedures.

(90)

(i) Headquarters, General Counsel (GC), is the administrative focal point for all DLA protests filed with the General Accounting Office (GAO). Immediately after receiving written notice from GAO of a protest, GC will notify the local office of counsel for the contracting activity involved that a protest has been filed with GAO. The local office of counsel shall promptly assign an attorney to the protest and notify GC and GAO of the name and phone number of the assigned attorney. Field counsel should consult DLA's Bid Protest Procedures Manual for specific procedures regarding protests before GAO.

(90) For local offices that have not been delegated the authority and responsibility to represent DLA in bid protests filed with GAO, GC will notify GAO of the assigned attorney.

(ii) The Chief Counsels of the following offices have been delegated the authority and responsibility to represent DLA in bid protests filed with GAO: DSCC, DFSC, DSCR, DPSC, DRMS, DAPSC, DCMD-E, and DCMD-W.

(iii) Contracting offices, through their legal staff, shall promptly inform GC of any protests which concern significant or unsettled issues of contracting law, regulation, or policy.

(2) Contracting activities and offices are responsible for providing notice to interested parties in accordance with FAR 3.104(a)(2).

(3)

(90) Upon receipt of a protest, the Chief Counsel of the field office must ensure that the protest is reviewed for possible corrective action or disposition using Alternative Dispute Resolution (ADR). For protests not resolved through ADR, the Chief Counsels shall ensure appropriate representation by their offices, including preparing and transmitting the documents required by FAR 33.104(a)(3). Letters transmitting agency reports should be signed by the Chief Counsels.

(91) Local offices of counsel that have not been delegated the authority and responsibility to represent DLA in bid protests filed with GAO shall forward the complete report, including all relevant documents, to GC within 20 days after the protest was filed with GAO, unless the circumstances in FAR 33.104(3)(i)(A) or (B) apply. If GAO has invoked the express option, local offices of counsel should contact GC to establish a report due date. Field counsel shall also furnish the names and addresses of any interested parties. GC shall be responsible for submitting the report required by FAR 33.104(a)(3) to GAO, and copies of the report to the protester and other interested parties.

(i)

(B) Requests for time extensions must first be approved by GC. Field counsel must submit a written request to GAO describing the circumstances requiring a time extension. This written request must be submitted to GAO early enough to permit filing of the report within the original time frame if the request is denied. If a time extension is granted, the field counsel must advise GC that GAO has established a new deadline for the submission of the agency report.

(4)

(i) Field counsel are also responsible for ensuring that GC receives a copy of the agency report by the day the report is due to GAO.

(90) Local offices of counsel that have not been delegated the authority and responsibility to represent DLA in protests filed with GAO shall delete any information and/or documents described in 33.104(a)(4) and shall identify the information and documents deleted in the cover letter transmitting the report to GC.

(5)

(iv) If field counsel believes that a party has violated the terms of a protective order, field counsel shall immediately notify GAO and GC.

(6) Field counsel shall promptly forward a copy of any comments received from the protester or any interested party to GC.

(7) The name, title, and telephone number of the senior procurement attorney in GC has been furnished to GAO as the designated DLA contact for protests.

(b) Protests Before Award

(1) If the contracting activity determines to award a contract after receipt of a protest, the head of the contracting activity (HCA), with the concurrence of the local office of counsel, shall make the written finding required by FAR 33.104(b)(1). Field counsel must send a copy of the finding to GC.

(90) Contracting offices for which the Executive Director, Procurement Management is the HCA (see DLAD 2.101) shall submit the proposed finding to GC for concurrence, through their local office of counsel. If concurred in, GC will then forward the proposed finding to the Executive Director, Procurement Management for approval. After the Executive Director, Procurement Management has signed the finding, MMP shall notify GC immediately and provide GC a copy of the written determination.

(2) Before the contracting activity authorizes contract award, field counsel shall notify GAO of the finding made under FAR 33.104(b)(1). For contracting offices where the Executive Director, Procurement Management is the HCA, GC will notify GAO of the finding made under FAR 33.104(b)(1).

(c) Protests After Award

(1) For purchase orders, award is considered to be made on the date the purchase order is issued. If a protest is received within 10 days of the date a purchase order is issued, the purchase order should be either suspended or canceled. This determination should be made in conjunction with the local office of counsel.

(2) If the contracting activity decides to continue contract performance pursuant to a written finding by the HCA under FAR 33.104(c)(2), that finding must be made with the concurrence of the local office of counsel. After the HCA has signed the authorization to continue performance, the local office of counsel shall notify GC of the HCA's finding and immediately provide GC a copy.

(90) Contracting offices for which the Executive Director, Procurement Management is the HCA (see DLAD 2.101) shall submit the proposed finding to GC for concurrence, through their

local office of counsel. If concurred in, GC will then forward the proposed finding to the Executive Director, Procurement Management for approval. After the Executive Director, Procurement Management has signed the finding, MMP shall notify GC immediately and provide GC a copy of the written determination.

(3) Before the contracting activity lifts the stop work order or performance is otherwise continued, field counsel shall notify GAO of the finding made under FAR 33.104(c)(2). For contracting offices where the Executive Director, Procurement Management is the HCA, GC will notify GAO of the finding made under FAR 33.104(c)(2).

(g) Notice to GAO.

(90) When a protest has been sustained, Chief Counsel shall notify GC if the contracting activity or office recommends the agency not follow the Comptroller General's recommendation. A final decision not to follow the Comptroller General's recommendation shall be made by the Executive Director, Procurement Management, with the concurrence of GC. If the Executive Director, Procurement Management determines, with GC concurrence, not to follow the Comptroller General's recommendation, GC shall notify the Chief Counsel in writing of the determination. Chief Counsel shall then submit the report, which must be signed by the HCA in accordance with FAR 33.104(g), within 60 days of receipt of the Comptroller General's decision, to GAO.

(h) Award of costs.

(90) The authority and responsibility for resolving claims for protest costs has been delegated to the Chief Counsels of the following offices: DOCCR, DFSC, DSCR, DPSC, DRMS, DAPSC, DCMD-E, and DCMD-W. This authority cannot be redelegated. The concurrence of the contracting officer is required on all decisions resolving claims for protest costs.

(91) The authority to resolve protest claims is applicable not only when the Comptroller General issues a decision recommending protests cost be paid, but also when the head of the agency takes corrective action after determining the solicitation, proposed award, or award does not comply with applicable laws and/or regulations. The amount paid, however, is limited by 31 U.S.C. § 3554(c)(2).

(92) Local offices of counsel that have not been delegated the authority to settle claims for protest costs shall forward requests for protest costs, attorneys' fees and/or bid or proposal preparation costs to GC. GC, in consultation with field counsel, will be responsible for disposition of the claim. After settlement of such requests, notice of the costs approved by GC will be sent to field counsel. Field counsels are responsible for ensuring the contracting offices pay the protester.

33.106 Solicitation provision and contract clause.

(c) The contracting officer shall insert a provision substantially the same as the provision at 52.233-9000 in all solicitations.

SUBPART 33.2 - DISPUTES AND APPEALS

33.209 Suspected fraudulent claims.

Referrals of suspected fraudulent claims will be referred to the local office of counsel for reporting to the General Counsel, in accordance with the DFARS 209.406 and DLAD 9.406.

33.212 Contracting officer's duties upon appeal.

The notice of final decision required by FAR 33.011 advises the contractor that it may submit a notice of appeal directly to either the Board of Contract Appeals or the U.S. Claims Court. When the contracting officer receives a copy of a notice of appeal, all records pertaining to the appeal will be held for review until final resolution. The appeal will then be processed as follows:

(a) Notice of Appeal to the Board of Contract Appeals. Notices of appeal or appeals, if submitted directly to the contracting officer, or responses to appeals if submitted directly to the Board of Contract Appeals, will be presented to the Board of Contract Appeals by the Counsel of the DLA field activity involved. Direct communication with the Board is authorized. The charter and rules of the Boards of Contract Appeals are set forth in the Supplement, Appendix A. All official correspondence to the Board will be addressed to the Recorder, Armed Services Board of Contract Appeals, 200 Stovall Street, Alexandria, Virginia 22332.

(b) Notice of Appeal to U.S. Claims Court. Notices of appeal filed directly with the U.S. Claims Court will be docketed and forwarded to General Counsel, by the Department of Justice. Upon receipt by General Counsel, of notice that litigation proceedings have been instituted, further notice and instructions shall be furnished to the Counsel for the DLA field activities involved for processing under normal litigation procedures.

33.213 Obligation to continue performance.

(a) When the Alternate I of the clause at FAR 52.233 -1, Disputes, is proposed to be used in contracts when permitted by the circumstances described in DFARS 233.214(2), the determination shall be approved by the chief of the contracting office at the DSCs, the Commanders of DDRE, DDRW, T-ASA, DRMS, DCMDs, and DCMCI, the Administrators **DAPSC** and DNSC. For those DLA activities not designated as a contracting activity (see DFARS 202.1(a)), the determination to use the Alternate I, as provided in DFARS 233.214(3), shall be forwarded to DLA Procurement (MMPOA) by cover letter signed by the Commander or the Administrator, DNSC, or **DAPSC** for approval by the Executive Director, Procurement **Management**. Examples of the types of unusual circumstances when continued performance may be determined to be vital to the national security or public health and welfare include the acquisition of weapons support systems, and related components other than those listed in DFARS 233.214(1), or other essential supplies or services whose timely reprocurement from other sources would be impracticable.